

<sup>3</sup> 47 C.F.R. § 24.203(b).

progress.<sup>4</sup> On September 9, 2002, Northstar filed a notification of construction for the Corbin BTA, indicating that it was providing service to 35.8 percent of its licensed area.<sup>5</sup>

### III. DISCUSSION

3. Northstar acknowledges that it did not timely satisfy the construction benchmarks set forth in section 24.203(b) of the Commission's rules for 10 MHz PCS licenses. Pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission's rules, a broadband PCS license will terminate automatically as of the construction deadline if the licensee fails to meet the requirements of section 24.203, unless the Commission grants an extension request or waives the PCS construction requirements.<sup>6</sup> Accordingly, without grant of extension of time or a waiver of the PCS construction rule, the subject license for the Corbin BTA automatically terminated as of the April 28, 2002 construction deadline. Waiver may be granted, pursuant to section 1.925 of the Commission's rules, if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>7</sup> An extension of time to complete construction may be granted, pursuant to sections 1.946(e) and 24.843(b) of the Commission's rules, if the licensee shows that the failure to complete construction is due to causes beyond its control.<sup>8</sup> Furthermore, in recognizing that compliance with the broadband PCS construction requirements may be difficult at times, the Commission has stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving the PCS construction requirements on a case-by-case basis.<sup>9</sup>

4. As discussed below, we find that Northstar fails to satisfy the criteria for grant of a waiver and/or an extension of time to satisfy its construction requirement. Northstar argues that a waiver of the construction deadline is warranted because application of the construction requirement will not serve the underlying purpose of the rule and that grant of a waiver will serve the public interest.<sup>10</sup> Northstar states that, although it acquired the license late in the term (in mid-March 2002, less than two

<sup>4</sup> See May Supplement; June Supplement; September Supplement; and December Supplement.

<sup>5</sup> See File No. 0001021125, filed September 6, 2002.

<sup>6</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2), 24.203.

<sup>7</sup> 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3, the Commission has authority to waive its rules if there is "good cause" to do so. 47 C.F.R. § 1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>8</sup> 47 C.F.R. §§ 1.946, 24.843. Section 1.946(e) also states specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

<sup>9</sup> See Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994) (*PCS MO&O*), citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>10</sup> See FCC Form 601 filed by Northstar on March 26, 2002, "Exhibit 1 - Limited Waiver and Extension of Time to Construct" at 5 ("Middlesboro/Somerset Extension Request"). We are incorporating into the record for this proceeding the facts and arguments set forth in the Middlesboro/Somerset Extension Request, Northstar's request for an extension of time to satisfy the construction requirement for KNLH637, the F Block license for the Middlesboro-Harlan, Kentucky BTA ("Middlesboro BTA") and KNLH638, the F Block license for the Somerset, Kentucky BTA ("Somerset BTA"). Northstar supplemented the Middlesboro/Somerset Extension Request to include the F Block license for the Corbin BTA, which is the subject of this proceeding. See May Supplement. Northstar confirmed that the facts at issue in this case are the same as those set forth in the Middlesboro/Somerset Extension Request. See December Supplement.

months prior to the construction deadline), it nevertheless “already secured leases for numerous sites to provide coverage well above the 25 percent requirement.”<sup>11</sup> Northstar also explains that it experienced a setback when its equipment vendor refused to sign a contract involving Rural Utility Service financing, thereby necessitating that Northstar find another equipment vendor just months prior to its construction deadline.<sup>12</sup> Northstar contends that “strict enforcement” of the construction requirement will not serve the public interest because it “will be providing service to underserved rural areas.”<sup>13</sup> Northstar also states that “the Commission is migrating toward relaxing or eliminating construction requirements altogether for some services,” and therefore requiring compliance with “archaic build-out requirements” is not in the public interest.<sup>14</sup> Northstar further states that other wireless licensees are subject only to a ten-year construction requirement as opposed to a five-year requirement, thereby raising parity concerns that should be taken into consideration.<sup>15</sup> Finally, Northstar argues that it should not be required to “expend funds to meet artificial deadlines,” in light of the fact that it is already providing service in the Corbin BTA using its C Block license and therefore “no [p]ublic [i]nterest is to be accomplished by virtue of Northstar also operating on the F Block.”<sup>16</sup>

5. We disagree with Northstar that application of the construction requirement in this case will frustrate the rule’s underlying purpose, or that grant of a waiver will serve the public interest. The Commission’s construction requirements are intended to ensure that the PCS spectrum is used effectively and made available to as many communities as possible.<sup>17</sup> In light of the fact that Northstar also holds the C Block license for the Corbin BTA and constructed the C Block license in a timely manner, grant of a waiver will not promote competition in the subject market. Furthermore, grant of a waiver will not expand service coverage in rural areas. Northstar used its existing C Block sites in order to provide coverage on the F Block,<sup>18</sup> thereby duplicating its coverage footprint rather than deploying PCS in previously unserved areas within the Corbin BTA. Northstar fails to explain how its F Block license will be used to provide new service offerings or otherwise enhance existing service within the Corbin BTA; on the contrary, in the course of explaining why it should not be required to “expend funds to meet artificial deadlines,” Northstar states that “because Northstar’s . . . already operating in the C Block in the Corbin market, there is no Public Interest to be accomplished by virtue of Northstar also operating on the F Block. In other words, Northstar already offers service to the very persons who would be potential candidates for service were it to offer service over F Block channels.”<sup>19</sup> While we recognize that Northstar has taken steps towards constructing its F Block PCS system prior to its construction deadline--such as securing financing and finding an equipment vendor -- these actions, in themselves, are insufficient to warrant an extension of time to satisfy the construction requirement. As we explained in *Northstar Technology, LLC*, in which we granted a prior request for extension of time filed by Northstar for the Middlesboro and Somerset BTAs, “service to rural areas is a critical component to grant” of the extension.<sup>20</sup> Although most of the facts underlying *Northstar Technology, LLC* were the same as those

<sup>11</sup> See Corbin Request at 1.

<sup>12</sup> See Middlesboro/Somerset Extension Request at 3.

<sup>13</sup> *Id.* at 5-6.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.*

<sup>16</sup> See June Supplement at 1.

<sup>17</sup> See PCS MO&O at 5018.

<sup>18</sup> See December Supplement.

<sup>19</sup> June Supplement at 1.

<sup>20</sup> See *Northstar Technology, LLC*, Request for Waiver and Extension of the Broadband PCS Construction Requirements, *Order*, 17 FCC Rcd 10908, 10911 (Comm. Wir. Div. 2002) (“*Northstar Technology, LLC*”).

presented here, the critical aspect of that case -- specifically, increased service and the promotion of vigorous competition in rural areas as a result of the grant of a waiver -- is absent from this case. In *Northstar Technology, LLC*, Northstar did not hold multiple licenses in the markets at issue and did not seek additional time merely to provide service to the same customers using the same cell sites. Based upon the record, and in contrast to *Northstar Technology, LLC*, we are not persuaded that grant of an extension in this case will afford any significant benefits to rural subscribers in the Corbin BTA.

6. Furthermore, we are not persuaded by Northstar's argument that, absent grant of the Extension Request, these markets may go unserved "for several years" due to the time necessary to re-auction the spectrum and to re-set the five-year construction deadline for a new PCS licensee.<sup>21</sup> It is evident that the Corbin BTA already is being served. First, as explained above, Northstar itself is already providing service within the Corbin BTA using the C Block spectrum. Second, our records indicate that all four counties that comprise the Corbin BTA receive coverage from at least two cellular carriers each.<sup>22</sup> In addition, multiple PCS carriers provide coverage within the Corbin BTA.<sup>23</sup> Third, *any* PCS licensee that requests an extension for a period of less than that given to meet the five-year construction benchmark could make the same argument, and grant of a waiver on this basis alone would effectively undermine the construction rules adopted by the Commission.

7. Finally, we dismiss Northstar's argument that enforcement of the construction requirement is contrary to the public interest because "the Commission is migrating toward relaxing or eliminating construction requirements altogether for some services" or because "licensees such as Northstar are inappropriately subject to both five-year and ten[-]year construction requirements that are not being applied to licensees in other services," thereby raises parity concerns.<sup>24</sup> We note as an initial matter that broadband PCS F Block licensees do not have both a five-year and a ten- year construction requirement, only a five-year requirement.<sup>25</sup> Second, Northstar is essentially arguing that the construction requirements for broadband PCS licensees should be modified to mirror those requirements imposed on other wireless licensees. This argument, however, is more appropriately raised in a petition for rulemaking. To the extent that broadband PCS licensees do have different construction requirements from licensees in other wireless services, the Commission has, when adopting specific construction requirements, taken into account various factors relevant to the spectrum in question, including the predicted likely uses of the spectrum, *e.g.*, fixed versus mobile wireless use,<sup>26</sup> and whether the spectrum is

<sup>21</sup> See Middlesboro/Somerset Extension Request at 7.

<sup>22</sup> The following cellular licensees are providing coverage to areas within the Corbin BTA: Verizon Wireless Tennessee Partnership (call sign KNKN655); ACC Kentucky License LLC (call signs KNKN666 and KNKN940); BellSouth Personal Communications, LLC (call signs KNKN673 and KNKN841); Litchfield County Cellular, Inc. (call sign KNKN787); Tennessee RSA No. 3 Limited Partnership d/b/a Eloqui Wireless (call sign KNKN792); East Kentucky Network, LLC d/b/a Appalachian Wireless (call sign KNKN809); Cumberland Cellular Partnership d/b/a Bluegrass Cellular (call sign KNKN814); and Cellular Phone of Kentucky, Inc. (call sign KNKN965).

<sup>23</sup> The following PCS licensees are providing coverage to areas within the Corbin BTA: Tritel C/F Holding Corp. (call sign WPOK618); Northstar Technology, LLC (call sign KNL370); Powertel Kentucky Licenses, Inc. (call signs KNLH408 and KNLH409); and Tritel A/B Holding Corp. (call sign WPOI255).

<sup>24</sup> See Middlesboro/Somerset Extension Request at 7.

<sup>25</sup> F-block PCS licensees are only required to meet a five-year construction benchmark of 25 percent population coverage or substantial service. See 47 C.F.R. § 24.203(b).

<sup>26</sup> In some circumstances where there was no clear indication what the spectrum would be used for, the Commission established a more flexible construction requirement -- for example, requiring the licensee to demonstrate that it has provided substantial service by the end of its license term. See, *e.g.*, Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and

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heavily encumbered.<sup>27</sup>

8. In conclusion, we are not persuaded that application of the construction requirement in this case would frustrate the underlying purpose of the rule or that grant of a waiver would serve the public interest. Based upon the record, we find that Northstar fails to satisfy the standard for either an extension of time and/or a waiver of the construction requirement. We therefore deny Northstar's Extension Request and find that its F Block license for the Corbin BTA automatically terminated on April 28, 2002, pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission's rules.<sup>28</sup>

#### IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the Request for Waiver and Extension of the Broadband PCS Construction Requirements filed by Northstar Technology, LLC on May 8, 2002 and supplemented on May 17, 2002, June 6, 2002, September 13, 2002, and December 18, 2002, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel  
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for Fixed Satellite Service, *Second Report and Order*, 12 FCC Rcd 12545, 12659 (1997) ("Without knowing the type of service or services to be provided, it would be difficult to devise specific construction benchmarks.").

<sup>27</sup> Incumbency can affect the actual benchmark (e.g., 800 MHz EA Upper 200 channels have a channel capacity requirement) or the amount of time to meet the benchmark (e.g., 700 MHz Band). See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, 11 FCC Rcd 1463, 1529 (1995); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476, 505 (2000).

<sup>28</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2).